

DEC 5 1978

MICHAEL RUDAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-898

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F.C.Y. CONSTRUCTION AND EQUIP-  
MENT COMPANY, INC., an Arizona  
Corporation; WINEGLASS LIVE-  
STOCK COMPANY, INC., an Ari-  
zona Corporation; CHRISTINE  
NICHOLS and CORRINE COOPER,

Petitioners,

v.

HARRISON, INC., a Minnesota  
Corporation; HUGH A. HARRISON  
and DOUGLAS A. RUSSELL,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI  
DIRECTED TO THE COURT OF APPEALS AND  
THE SUPREME COURT OF THE STATE OF ARIZONA

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**RAINERI & RAINERI**

By Joseph C. Raineri, Sr.

2001 North Scottsdale Road  
Scottsdale, Arizona 85257*Attorneys for Petitioners*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No.

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F.C.Y. CONSTRUCTION AND EQUIP-  
MENT COMPANY, INC., an Arizona  
Corporation; WINEGLASS LIVE-  
STOCK COMPANY, INC., an Ari-  
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v.

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1978

No.

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F.C.Y. CONSTRUCTION AND EQUIP-  
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PETITION FOR A WRIT OF CERTIORARI  
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TO THE HONORABLE CHIEF JUSTICE WARREN  
BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully petition  
for a hearing before this Honorable Court to  
review and reverse summary judgments of the  
Court of Appeals and the Supreme Court of the  
State of Arizona rendered against the peti-  
tioners.

### OPINION BELOW

The memorandum opinion of the Court of Appeals dated June 6, 1978, is attached hereto as Appendix "A" and made a part hereof by reference.

Petitioners filed a timely Motion for Rehearing which was denied on July 10, 1978, and is attached hereto as Appendix "B" and made a part hereof by reference.

A timely Petition for Review was filed with the Supreme Court of the State of Arizona and was denied on September 7, 1978, and is attached hereto as Appendix "C" and made a part hereof by reference.

### QUESTIONS PRESENTED

This litigation involved two separate actions. One was an action for Declaratory Judgment to establish petitioner's ownership in certain ranches, including the Eleven Lakes Ranch. The second action was one in which petitioners sought to have a constructive trust established in said ranches including the Eleven Lakes Ranch, because respondents acting in concert, collusively made certain fraudulent misrepresentations and thus surreptitiously deprived them of their interests in said ranches. The trial court summarily and wrongfully entered summary judgment in favor of the respondents in both of these actions.

1. Whether the action of the Arizona Court of Appeals in affirming the lower court judgments and directing the entry of summary judgments in both actions, when the record undisputably and unequivocally

revealed that there were disputed material questions of fact, which if resolved against respondents, could adversely affect final judgment without a trial on the merits is consistent with the Due Process Clause of the Fourteenth Amendment.

2. Whether the action of the Arizona Court of Appeals in affirming the lower court judgments and directing the entry of summary judgments as aforesaid without a trial on the merits before a jury is consistent with the Seventh Amendment, which provides that the right of trial by jury shall be preserved.

#### CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States Amendment XIV, § 1:

"---nor shall any state deprive any person of life, liberty or property, without due process of law---."

Constitution of the United States Amendment VII:

"In Suits at common law,---the right of trial by jury shall be preserved---."

#### STATEMENT OF FACTS

As above indicated, the petitioners commenced two actions to establish an ownership or fee title interest in certain ranches, including the Eleven Lakes Ranch, which respondents by one of their witnesses admitted itself had a valuation of

One Million Dollars. The petitioners had certain appeals pending in the Court of Appeals of the State of Arizona and based upon certain promises and representations made by the defendants who were predecessors in title to respondents with whom the latter were in privity, petitioners dismissed their appeals above-mentioned.

The petitioners filed a counter affidavit resisting the summary judgment applications by respondents which was executed by Corrine Cooper in which the latter set forth factual assertions. The Arizona Court of Appeals at p. 6 of its opinion hereto attached as Appendix "A" concedes that the contents of Corrine Cooper affidavit contained factual assertions, which were cognizable in a summary judgment determination, but notwithstanding it affirmed the action of the lower court erroneously granting summary judgments.

In addition, the record is replete with admissions on the part of respondents reflecting an outstanding ownership interest to be in the petitioners in the face of triable issues of fact.

Respondents wholly failed to controvert the affidavit of Corrine Cooper, *supra* (which the Court of Appeals in its opinion indicated contained factual assertions cognizable in summary judgment determination) such failure on the part of the petitioners constituted a judicial admission thereof which prevented the granting of summary judgments.

The respondents commencement of a quiet title action by way of a counterclaim against the petitioners likewise created a factual issue to be determined, which

indisputably, and unequivocally, would prevent the granting of summary judgments in these actions.

The defendants, in the foregoing actions, as predecessors in title to the respondents with whom the latter were in privity, and in making the foregoing misrepresentations, committed acts and pursued a course of conduct which was fraudulent, willful, malicious, and were consummated and perpetrated with a willful design to cheat and defraud petitioners, all of which constituted triable issues of fact in the record which prevented the granting of summary judgments and could have resulted in the imposition of a constructive trust had there been a trial on the merits.

#### REASONS FOR GRANTING THE WRIT

Throughout these proceedings, both in the lower court, and before the Arizona Court of Appeals and the Arizona Supreme Court, the petitioners were persistent and adamant in their contentions that the record revealed that there were triable issues of fact, upon which reasonable men might reach different conclusions, and that the trial court should have permitted the cases to go to trial upon the merits before a jury.

The actions of the Arizona Court of Appeals and the Arizona Supreme Court, cannot be squared, with the clear mandates of the Fourteenth Amendment and Seventh Amendment, in that the petitioners constitutional rights to due process and a trial by jury were clearly denied unto them as a result of the affirmance of the summary judgments entered in the lower court.

No chance was afforded to the petitioners to be confronted or to cross-examine those who were opposed to their fee title interest in these Ranches, including the Eleven Lakes Ranch. The Ranches in question, being worth millions of dollars; nor were the petitioners awarded the opportunity to present their own evidence relating to their ownership interests in said Ranch properties. *Slockower v. Board of Education*, 350 U.S. 551; *Perla v. New York*, 392 U.S. 296.

Petitioners were obviously denied their day in Court. Notice and an opportunity to be heard are fundamental principles of due process of law. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; *In re Gault*, 387 U.S. 1; *Sniadich v. Family Finance Corp.*, 395 U.S. 337; *Randone v. Appellate Department*, 5 Cal. 3d 536.

Review by the United States Supreme Court of a decision of a state court is authorized if it is claimed that a state has in violation of the Federal Constitution, deprived petitioner of life, liberty, or property, without due process of law. *Napue v. People of State of Illinois*, 360 U.S. 264; *Slockower v. Board of Higher Ed. City of N. Y.*, 350 U.S. 551; *Hoyt v. State of Fla.*, 368 U.S. 57.

#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Arizona Court of Appeals.

Respectfully submitted,

RAINERI & RAINERI

By Joseph C. Raineri, Sr.

*Attorneys for Petitioners*

APPENDIX "A"  
 IN THE  
 COURT OF APPEALS  
 STATE OF ARIZONA  
 DIVISION ONE

F.C.Y. CONSTRUCTION AND EQUIP- )  
 MENT COMPANY, INC., an Arizona )  
 corporation; CHRISTINE NICHOLS )  
 and CORRINE COOPER, )

Appellants, )

1 CA-CIV 3250

v. )

HARRISON, INC., a Minnesota )  
 corporation; HUGH H. HARRISON; )  
 and DOUGLAS A. RUSSELL, )

Appellees. )

---

F.C.Y. CONSTRUCTION AND EQUIP- )  
 MENT COMPANY, INC., an Arizona )  
 corporation; WINEGLASS LIVE- )  
 STOCK COMPANY, INC., an Ari- )  
 zona corporation; CHRISTINE )  
 NICHOLS and CORRINE COOPER, )

Appellants, )

1 CA-CIV 3251

DEPARTMENT B

MEMORANDUM  
 DECISION

v. )

HARRISON, INC., a Minnesota )  
 corporation; HUGH H. HARRISON; )  
 and DOUGLAS A. RUSSELL, )

Appellees. )

(Not for Pub-  
 lication;  
 Rule 48,  
 Rules of the  
 Arizona Su-  
 preme Court)

(FILED: June 6, 1978)

Appeal from the Superior Court  
of Yavapai County

Cause No. C-30465

Cause No. C-29494

(Consolidated)

The Honorable James Hancock, Judge

AFFIRMED

EUBANK, Presiding Judge

This appeal challenges summary judgments holding that appellants had no interest affecting title to the Eleven Lakes Ranch located in Chino Valley in Yavapai County, Arizona. Appellant argue that issues of material fact were raised in the pleadings, affidavits, and documents filed with the trial court. We disagree. The basic facts of this case are undisputed. Only the ultimate legal conclusions to be drawn from those facts remained for the trial court's determination. We believe the trial court correctly decided this matter, and therefore affirm the judgment.

Mr. B. A. Yarbrow, not a party to this action, once owned all or part of the Eleven Lakes Ranch. Appellants invested substantial sums of money in improving the Eleven Lakes Ranch while it was owned by Yarbrow. Between 1962 and 1964, all of the Eleven Lakes Ranch property was acquired by Arizona Savings and Loan Association at three separate sheriff's sales. Sheriff's deeds were issued after the applicable periods of redemption expired. On May 20, 1963, Yarbrow, his wife, and Wineglass Ranches, Inc. quit-claimed and assigned to

Arizona Savings and Loan any interest they had in the Eleven Lakes Ranch property. After Arizona Savings recorded its deeds, it owned Eleven Lakes Ranches free and clear of any rights of redemption or other claims.

In 1968 and 1969, the appellants were involved in litigation with Westec Corporation concerning several other ranches in the Chino Valley area.

The litigation was settled by an agreement among appellants, Westec, Yarbrow, Herbert E. Edwards, and Bernard S. Selwyn. Pursuant to the settlement, appellants agreed to a dismissal of their pending appeal against Westec, and Selwyn Arizona Associates (Selwyn and Edwards) agreed to purchase the ranches from Westec and hire Yarbrow to manage the properties. In some undisclosed manner appellants intended to receive a percentage of the profits derived from managing and selling the properties. Selwyn Arizona Associates apparently further agreed to acquire Eleven Lakes Ranch and include it in the agreement, even though Eleven Lakes was not involved in the litigation.

Selwyn Arizona Associates did not, however, acquire Eleven Lakes Ranch directly. On August 30 and September 15, 1968, Arizona Savings, while in receivership, obtained court permission to sell the Eleven Lakes property. On September 5, 1968, Arizona Savings deeded Eleven Lakes Ranch to Transamerica Title Insurance Company, as trustee of a real estate holding trust of which Henry C. Soto was the sole beneficiary. Subsequently, Soto transferred his beneficial interest in Eleven Lakes to Henry C. Soto Corporation. It

was from Soto Corporation that Selwyn and Edwards acquired the beneficial interest to Eleven Lakes Ranch on September 28, 1968. The beneficial interest was not assigned to Selwyn Arizona Associates, however, but to F.O.M. Investment Corporation. Bernard Selwyn accepted the assignment for F.O.M. as corporate secretary.

On July 26, 1968, before Selwyn and Edwards obtained the beneficial interest in Eleven Lakes Ranch, Selwyn Arizona Associates and Yarbrow entered into the first of two management agreements. The agreement provided that Yarbrow was to be employed as general manager of all Selwyn Arizona Associates' properties in Chino Valley, receiving a salary plus a bonus equal to twenty percent of the net profits of Selwyn Arizona Associates. Yarbrow was also given a conditional right of first refusal if Selwyn Arizona Associates decided to sell any of the property involved in the agreement. The occurrence that would defeat Yarbrow's right was Selwyn Arizona Associates' sale of any property at a price equal to Selwyn Arizona Associates' cost of acquisition plus twenty percent for every year Selwyn Arizona Associates owned the property. In exchange for these promises, Yarbrow was to turn over to Selwyn Arizona Associates all his interest in a number of properties in Chino Valley. Among the properties listed was "The Eleven Lakes Ranch, now owned by Arizona Savings and Loan Association, in receivership." Despite the inclusion of Eleven Lakes in the agreement, Yarbrow by that time had no interest in the property to transfer to Selwyn Arizona Associates.

Yarbrow assigned his contingent interest in the twenty percent bonus under the

management contract to two of the appellants on August 17, 1968. On September 20, 1968, he assigned to appellants the remainder of his rights under the contract.

After Selwyn and Edwards had acquired the beneficial interest to Eleven Lakes Ranch, Selwyn Arizona Associates and Yarbrow entered into a second management agreement. This agreement, executed on July 22, 1969, expressly superseded the first. The provisions in the second agreement for Yarbrow's compensation and right of first refusal were nearly identical to those in the first. The agreement also recited.

1. We recognize that you [Yarbrow] have had and/or presently have some interests in and to certain properties located in the Chino Valley which properties are as follows: ....

(e) The Eleven Lakes Ranch.

\* \* \*

2. As you know, Selwyn Arizona Associates has for some time been conducting various activities in the Chino Valley looking toward the acquisition and development of certain properties in said Chino Valley. In this connection, you will recall that last year Selwyn Arizona Associates purchased the Eleven Lakes Ranch....

The 1969 agreement, like the 1968 contract, was a general management contract. The 1969 contract expressly rejected characterizing the agreement either as a partnership or a joint venture.

Yarbrow again assigned his right to

compensation under the agreement to appellants. He did not, however, assign his right of first refusal. On September 7, 1973, Yarbrow recorded both the 1968 and the 1969 agreements, certifying that the second superseded the first. At the same time he recorded his assignments of his rights to compensation under the contracts.

On April 1, 1972 Harrison, Inc., a Minnesota corporation, agreed to loan Selwyn-Edwards & Associates, a partnership \$200,000.<sup>1/</sup> An additional \$25,000 was to be loaned later. Harrison's relationship with Selwyn-Edwards was specifically defined in the agreement as "one of lender and borrower," rather than as a "partner or joint venturer." To secure repaying of the loan Selwyn-Edwards agreed to cause to be assigned to Harrison the sole beneficial interest in Eleven Lakes Ranch. On April 5, 1972, F.O.M. collaterally assigned its beneficial interest in the trust holding Eleven Lakes Ranch to Harrison. Although Selwyn-Edwards held no record interest in the property, it joined in the Collateral Assignment as assignors. The assignment was expressly approved by Yarbrow as ranch manager.

Selwyn-Edwards subsequently defaulted on its indebtedness to Harrison. As a result, on October 19, 1973, F.O.M. directed Transamerica to terminate the trust and convey all the trust property to Harrison in satisfaction of the delinquent loan. Transamerica complied and conveyed Eleven Lakes Ranch to Harrison by warranty deed on October 22, 1973.

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<sup>1/</sup>Selwyn-Edwards & Associates is a different partnership from Selwyn Arizona Associates.

On the same day that F.O.M. directed Transamerica to convey Eleven Lakes Ranch to Harrison, appellants filed their first complaint in this action. They alleged that Selwyn and Edwards had failed to operate profitably a number of ranch properties, including Eleven Lakes Ranch. They further alleged that the loan to Harrison was in default and the transfer of Eleven Lakes Ranch was imminent. The appellants prayed for a declaration that Selwyn and Edwards held the ranches in constructive trust for them.

As a result of the conveyance to Harrison three days after the first complaint was filed, appellants filed a second lawsuit on September 6, 1974. This complaint was essentially similar to the first, but prayed for a declaration that Harrison held the property as constructive trustee for the plaintiffs. Appellants filed a lis pendens with both complaints.

Appellees moved for summary judgment in both actions on the grounds that appellants had no legal or equitable interest affecting title to Eleven Lakes Ranch. Both motions were granted, and the two cases were consolidated for appeal.

Appellants first assert that summary judgment was not proper because issues of material fact remained for determination. They point to the many allegations in their pleadings and motions that they possess an ownership interest in Eleven Lakes Ranch. These allegations are, at best, conclusory statements concerning ultimate facts. The only factual assertions advanced by appellants that are cognizable in a summary judgment determination are found in the affidavit of Corine Cooper. That affidavit essentially describes the agreement among

appellants, Westec, Yarbrow, Selwyn, and Edwards under which Selwyn-Edwards acquired Eleven Lakes Ranch and hired Yarbrow as general manager. These facts are undisputed. The only question is which party is entitled to judgment as a matter of law.

It seems clear that appellants have no legal interest in Eleven Lakes Ranch. The only rights appellants could have obtained are through the assignments from Yarbrow. Since the second assignment expressly superseded the first, it is the only one legally effective. The second assignment transfers only Yarbrow's right under the second management agreement to twenty percent of the profits obtained by the operation of Eleven Lakes Ranch. Even if it purported to convey more, Yarbrow had no further interest in Eleven Lakes Ranch to transfer. The second management agreement recognized only: ". . . you have had and/or presently have . . ." some interest in Eleven Lakes Ranch/ and from the title record of Eleven Lakes, it is clear that Yarbrow formerly had an interest in the ranch. However, the contract neither stated that Yarbrow currently had an interest nor purported to transfer an interest. Thus there was no way by which appellants could have obtained any legal interest in the title to Eleven Lakes Ranch through Yarbrow.

Appellants seek to impose a constructive trust on Eleven Lakes on the basis that it would be inequitable to allow Harrison to retain the property. They point out that they expected to receive substantial income from the management and sale of Eleven Lakes Ranch when they dismissed their litigation against Westec. According

to appellants, Selwyn and Edwards failed to operate the ranch profitably, thereby damaging appellants, who should be entitled to have the ebeneffits of ownership of Eleven Lakes Ranch. Further, they argue that a constructive trust can be imposed against Harrison, because the lis pendens filed on October 19, 1973 put Harrison on notice of appellants' claims to the property when it received the deed from Transamerica on October 22.

At this Court has previously stated:

A constructive trust is a remedial device created by courts of equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.

ARM, INC. v. TERRAZAS, 24 Ariz. App. 441, 442, 539 P.2d 915, 916 (1975). The question then is whether Selwyn and Edwards unfairly held the beneficial interest in Eleven Lakes Ranch when the appellants were justly entitled to hold it. Generally, a constructive trust will be imposed only when the holder of the property is guilty of fraud, either actual or implied. See HONK v. KARLSSON, 80 Ariz. 30, 37, 292 P.2d 455, 459-60 (1956). Appellants argue that a constructive trust may be imposed in the absence of fraud where the circumstances make it inequitable for the possessor to continue holding the property. See IN RE ESTATE OF ROSE, 108 Ariz. 101, 104, 493 P.2d 112, 115 (1972). Regardless of the merits of appellants' argument, the law is that the circumstances giving rise to a constructive trust (whether fraudulent or merely inequitable) must relate to the way in which title

See ARM, INC. v. TERRAZAS, 24 Ariz. App. 441, 443, 539 P.2d 915, 917 (1975). See also RESTATEMENT OF RESTITUTION § 183 (1937). The record shows that Selwyn and Edwards acquired the beneficial interest to Eleven Lakes Ranch from Henry Soto Corporation; and appellants have shown nothing in Selwyn and Edwards' contention of the beneficial interest to the property which would justify the imposition of a constructive trust. The acquisition of the ranch by Harrison was likewise without wrongdoing. Mere dispute or inequitable conduct between Selwyn and Edwards and the appellants cannot result in a constructive trust imposed on land acquired by Selwyn and Edwards from Henry Soto Corporation.<sup>2/</sup>

Appellants have neither a legal nor equitable claim to Eleven Lakes Ranch. The summary judgments entered in favor of Harrison were correct.

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<sup>2/</sup> Appellants also argue that Harrison's interest in Eleven Lakes Ranch is only a mortgage. Selwyn-Edwards & Associates have a right to redeem the ranch until January 1, 1979. Appellants maintain that under A.R.S. § 33-702, this right of redemption renders Harrison's interest a mortgage. Even accepting appellants' argument, it is completely irrelevant to their claim of ownership. Further, the argument itself is totally frivolous and without merit. In order for a mortgage to exist there must be a debtor and a creditor. See COFFIN v. GREEN, 21 Ariz. 54, 58-59, 185 P. 361, 362-63 (1919). When Eleven Lakes Ranch was conveyed to Harrison, the relationship of Harrison to Selwyn-Edwards was no longer one of creditor and debtor. The conveyance satisfied the debt.

/s/ William E. Eubank  
WILLIAM E. EUBANK  
Presiding Judge

CONCURRING:

/s/ Laurance T. Wren  
LAURENCE T. WREN, Judge

/s/ Levi Ray Haire  
LEVI RAY HAIRE, Judge

APPENDIX "B"

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

F.C.Y. CONSTRUCTION AND EQUIP- )  
MENT COMPANY, INC., an Arizona )  
corporation; WINE-GLASS LIVE- )  
STOCK COMPANY, INC., an Ari- )  
zona corporation; and CHRIS- )  
TINE NICHOLS and CORRINE )  
COOPER, )

Plaintiffs, Appellants, )

v. )

TRANSAMERICA TITLE INSURANCE )  
COMPANY OF ARIZONA, an Arizona )  
corporation; SELWYN ARIZONA )  
ASSOCIATES, a Partnership, )  
RAMMCO INVESTMENT CORPORATION, )  
a California corporation; HER- )  
BERT E. EDWARDS; BERNARD S. )  
SELWYN; HARRISON, INC., a )  
Minnesota corporation; DOUGLAS )  
A. RUSSELL; WESTEC CORPORA- )  
TION, a Nevada corporation; )  
TECH-SYM, a TECH-SYM, a Ne- )  
vada corporation; B. A. YARBRO )  
AND ENID YARBRO, his wife; )  
FRANK KANAN, JOHN DOES I thru )  
100 and all unknown heirs of )  
the above defendants, )

Defendants, Appellees. )

1 CA-CIV 3250  
1 CA-CIV 3251  
(consolidated)

DEPARTMENT B

YAVAPAI County  
Superior Court  
Nos. C-30465  
and C-29494

O R D E R

(FILED: July 10, 1978)

Appellants' Motion for Rehearing and the objection thereto were considered by the court, Presiding Judge William E. Eubank, and Judges Levi Ray Haire and Laurance T. Wren participating.

IT IS ORDERED denying appellants' Motion for Rehearing.

DATED this 10th day of July, 1978.

/s/ William E. Eubank  
WILLIAM E. EUBANK, Presiding  
Judge DEPARTMENT B

[Verification of mailing]

# APPENDIX "C"

## [LETTERHEAD OF THE SUPREME COURT OF THE STATE OF ARIZONA]

F.C.Y. CONSTRUCTION AND	)	
EQUIPMENT COMPANY, INC.,	)	
an Arizona corporation;	)	
CHRISTINE NICHOLS and	)	
CORRINE COOPER,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 13867-PR
	)	
HARRISON, INC., a Minnesota	)	Court of Ap-
corporation; HUGH H. HARRI-	)	peals
SON; and DOUGLAS A. RUSSELL,	)	
	)	Nos.
Appellees.	)	1 CA-CIV 3250
	)	and 1-CA-CIV
	)	3251
	)	(Consolidated)
F.C.Y. CONSTRUCTION AND	)	
EQUIPMENT COMPANY, INC.,	)	
an Arizona corporation;	)	Yavapai County
WINEGLASS LIVESTOCK COM-	)	Nos. C-30465
PANY, INC., an Arizona cor-	)	and C-29494
poration; CHRISTINE NICHOLS	)	(Consolidated)
and CORRINE COOPER,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
HARRISON, INC., a Minnesota	)	
corporation; HUGH H. HARRI-	)	
SON; and DOUGLAS A. RUSSELL,	)	
	)	
Appellees.	)	

The following action was taken by the

Supreme Court of the State of Arizona on  
September 7, 1978 in regard to the above-  
entitled cause:

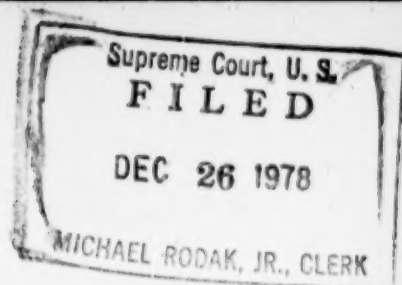
"ORDERED: Petition for Review =  
DENIED."

Record returned to the Court of Ap-  
peals, Division One, Phoenix, this 8th  
day of September, 1978.

CLIFFORD H. WARD, Clerk

By /s/ Becky Sanchez

Deputy Clerk



IN THE

**Supreme Court of the United States**

October Term, 1978

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No. 78-898

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F.C.Y. CONSTRUCTION AND EQUIPMENT COMPANY,  
INC., an Arizona corporation; WINEGLASS LIVESTOCK  
COMPANY, INC., an Arizona corporation; CHRISTINE  
NICHOLS and CORRINE COOPER,  
Petitioners,

v.

HARRISON, INC., a Minnesota corporation; HUGH H.  
HARRISON; and DOUGLAS A. RUSSELL,  
Respondents.

---

On Petition for a Writ of Certiorari to the Court of Appeals  
and the Supreme Court of the State of Arizona

---

**BRIEF FOR RESPONDENTS IN OPPOSITION**

**LEWIS AND ROCA**

By Roger W. Kaufman  
Paul G. Ulrich  
Susan M. Freeman

100 West Washington Street  
Phoenix, Arizona 85003

*Attorneys for Respondents*

IN THE  
**Supreme Court of the United States**

October Term, 1978

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No. 78-898

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F.C.Y. CONSTRUCTION AND EQUIPMENT COMPANY,  
INC., an Arizona corporation; WINEGLASS LIVESTOCK  
COMPANY, INC., an Arizona corporation; CHRISTINE  
NICHOLS and CORRINE COOPER,

Petitioners,

v.

HARRISON, INC., a Minnesota corporation; HUGH H.  
HARRISON; and DOUGLAS A. RUSSELL,

Respondents.

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On Petition for a Writ of Certiorari to the Court of Appeals  
and the Supreme Court of the State of Arizona

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BRIEF FOR RESPONDENTS IN OPPOSITION

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Amendment Fourteen .....	5,7
28 U.S.C. § 1257(3) .....	2,7
<i>Other Authorities:</i>	
Stern & Gressman, <i>Supreme Court Practice</i> §§ 3.25 and 3.26 (4th ed. 1969) .....	7
§§ 4.11-4.15 (4th ed. 1969) .....	8

IN THE

## Supreme Court of the United States

October Term, 1978

No. 78-898

F.C.Y. CONSTRUCTION AND EQUIPMENT COMPANY, INC., an Arizona corporation; WINEGLASS LIVESTOCK COMPANY, INC., an Arizona corporation; CHRISTINE NICHOLS and CORRINE COOPER,

Petitioners,

v.

HARRISON, INC., a Minnesota corporation; HUGH H. HARRISON; and DOUGLAS A. RUSSELL,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals and the Supreme Court of the State of Arizona

### BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents request that the petition for certiorari in this matter be denied.

### OPINIONS BELOW

The unreported memorandum decision of the Arizona Court of Appeals appears at the Appendix to the Petition, page A-1. The formal judgments entered by the Yavapai County Superior Court are attached hereto as Appendices A and B.

### JURISDICTION

The memorandum decision of the Arizona Court of Appeals was entered on June 6, 1978. A timely filed motion for rehearing was denied on July 10, 1978. A petition for review by the Arizona Supreme Court was thereafter denied on September 7, 1978. The petition for certiorari was filed on December 5, 1978. This Court has jurisdiction under 28 U.S.C. § 1257(3).

### QUESTION PRESENTED

We cannot agree that the "questions presented" offered by petitioners were questions actually presented to or decided by the courts below. We therefore restate the question as follows:

Have the three concurring courts below fairly determined under Arizona law that petitioners' only recorded interest to certain real property is a mere contractual right to a percentage of profits in case of its sale, that petitioners have no interest affecting its title, and that the record contains no factual basis supporting the imposition of a constructive trust concerning it?

### STATEMENT OF FACTS

This petition concerns whether summary judgments were correctly entered under Arizona law holding that petitioners had no real property interest affecting title to the Eleven Lakes Ranch, located in Yavapai County, Arizona. Petitioners filed their first complaint and lis pendens on October 19, 1973, seeking a declaration of the ownership rights, beneficial interests, and duties of the parties with respect to this property. Petitioners then filed a second suit challenging

respondent Harrison, Inc.'s. ("Harrison") deed to the property and seeking a declaration that Harrison held the property as a constructive trustee for them.

Respondents thereafter filed motions for summary judgment in the Yavapai County, Arizona, Superior Court on the narrow ground that petitioners had no legal interest affecting title to the Eleven Lakes Ranch and that their lis pendens neither constituted nor gave notice of a legal claim upon its title. These motions were granted separately in each case by the superior court on May 21, 1975. Final judgments in favor of respondents and quashing the lis pendens were thereafter filed in both suits. They are attached hereto as Appendices A and B. These judgments were thereafter affirmed in the unpublished memorandum decision of the Arizona Court of Appeals attached as Appendix A to the Petition.

The documents constituting the Eleven Lakes Ranch chain of title and the transactions involving one B. A. Yarbrow, from whom petitioners claim their interest, are somewhat involved. They are accurately summarized in the court of appeals decision and need not be repeated here. For this Court's convenience, however, we attach as Appendix C to this Response a chart summarizing the chain of title and the Yarbrow transactions based on the record before the Arizona courts. The chart was attached as an appendix to respondents' answering brief in the court of appeals.

The chart and the facts summarized in the court of appeals' decision confirm that Yarbrow lost whatever legal interest he might have had in the Eleven Lakes Ranch through a series of sheriff's deeds and a quit claim deed executed in 1962-64, long before the operative transaction relevant to this action. His only later interest, which was the basis for

petitioners' claim, was merely a contract right to a contingent percentage commission based on net profits in case of sale of ranch land. At the time of the assignment of this interest to petitioners, Yarbrow had no legal interest of record in the Eleven Lakes property.

The issues litigated in the Arizona courts related only to whether and on what basis petitioners had any interest affecting title to the Eleven Lakes Ranch or whether any facts existed requiring the imposition of a constructive trust on that real property under Arizona law. No federal questions were presented to or decided by the Arizona courts at any time. Instead, the superior court simply entered a partial summary judgment holding that petitioners had no interest affecting the title to the Eleven Lakes Ranch or in the conveyance of that property to respondent Harrison, that their lis pendens did not constitute record notice of any legal claim to a lien or interest in the title to that property, that it neither constituted nor gave notice of any cloud upon the title to that property, and that the lis pendens should therefore be quashed. These summary judgments were affirmed by the court of appeals on the basis that Yarbrow had no legal interest in the Eleven Lakes Ranch, had not purported to transfer any such interest to petitioners, and that there were no facts justifying imposition of the constructive trust on the property.

Petitioner's motion for rehearing in the court of appeals reiterated their earlier claims. Under Arizona practice, their petition for review was submitted to the Supreme Court of Arizona based on the prior record without additional argument. That petition was denied without opinion. The questions now presented in the petition alleging denials of constitutional rights to trial by jury and of due process in

violation of the Seventh and Fourteenth Amendments have thus never previously been presented to or decided by any of the courts below. All three Arizona courts presented with this matter have instead dealt with and rejected petitioners' claims as presented—solely as matters of Arizona law.

#### REASONS FOR DENYING THE WRIT

##### I. *The Arizona Courts Have Properly Determined Questions of State Law that Should Not Be Reviewed Here.*

The determinations by the Yavapai County Superior Court and the Arizona Court of Appeals that petitioners had no legal interest in the Eleven Lakes Ranch property and that their lis pendens should therefore be quashed were correct as matters of Arizona law. The court of appeals carefully reviewed and analyzed the chain of title to the Eleven Lakes Ranch property and the various agreements shown in the attached summary. The court of appeals held that "there was no way by which appellants could have obtained a legal interest in the title to Eleven Lakes Ranch through Yarbrow" (Petition, A-8). It also held, applying the Arizona law on constructive trusts, that no facts existed to impose such a trust or give petitioners any equitable claim to the Eleven Lakes Ranch (Petition, A-10). In reaching these conclusions, the court of appeals considered the Corrine Cooper affidavit upon which petitioners principally rely here. It held, however, that the affidavit was insufficient as a matter of law to raise any material issues of disputed fact so as to preclude entry of partial summary judgment dismissing this portion of petitioners' claims.

Any claim that the court of appeals decision was in error as a matter of Arizona law or in conflict with any decision

of this Court is conspicuously absent from the petition. Instead, petitioners contend only that the Arizona appellate courts improperly affirmed the superior court's summary judgments because the record presented issues of fact requiring the cases to go to trial. The petition does not specify precisely what these issues are or explain how any such fact issues rise to the level of substantial federal questions. The fact of the matter is that the only affidavit presented in opposition to respondents' motion, that of Corrine Cooper, did not raise any factual issue regarding petitioners' lack of interest in the Eleven Lakes Ranch property. This issue was fully briefed, argued, and decided by the court of appeals.

The matters presented for review are only specific factual matters. Those matters are inappropriate for this Court to review. As this Court stated in *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 925 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." This is particularly true when all of the courts below have concurred. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672 (1949), *aff'd*, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097 (1950), and cases there cited; *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

II. *The Alleged Federal Questions Presented in the Petition Have Not Been Previously Raised Before the Arizona Courts. They Thus Cannot Be Raised for the First Time in the Petition.*

Petitioners for the first time now attempt to raise federal constitutional questions. They now claim that the entry of summary judgments denied their rights to jury trials and to

due process in violation of the Seventh and Fourteenth Amendments. Petitioners have, however, wholly failed to "set up or claim" these issues in the Arizona courts as required by 28 U.S.C. § 1257(3) to preserve them for review by this Court. As this Court stated in *F. G. Oxley Stave Co. v. Butler County, Mo.*, 166 U.S. 648, 655, 17 S. Ct. 709, 711, 41 L. Ed. 1149 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right." See generally Stern & Gressman, *Supreme Court Practice* §§ 3.25 and 3.26 (4th ed. 1969). There have been no such averments here. There is thus nothing properly presented to this Court for review.

Not surprisingly, the Petition presents no authorities supporting its proposition that the lower courts' determinations that no material questions of fact were raised precluding summary judgments somehow bootstrap an otherwise entirely Arizona law matter into one involving substantial federal questions. If petitioners were correct, all state court summary judgments, regardless of the issues actually involved, would be entitled to review by this Court. Moreover, on this record, such a claim is patently specious. At all times in the Arizona courts, this matter has been argued and decided wholly with reference to Arizona law concerning real property interests and constructive trusts. No federal question has ever been previously presented or decided. None should therefore be considered here.

III. *The Issues Here Involved Are Not of Sufficient Importance or General Interest to Warrant Review.*

Despite petitioners' puffing, this case concerns nothing more than a summary judgment relating to a particular parcel of real property. The judgment is of interest and importance only to the immediate parties. Summary judgment was in fact properly granted, but regardless of the merits, that issue is not of sufficient importance or general interest to warrant this Court's review. Although the issue may be important to the parties, it must be "beyond the academic or the episodic" for this Court to undertake its consideration. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955). On this record, there simply are no important constitutional, statutory, or procedural issues requiring determination. Nothing in this record suggests that the decisions below were so "shockingly wrong" as to present any substantial due process questions. See generally Stern & Gressman, *supra*, §§ 4.11 through 4.15.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,  
LEWIS AND ROCA

By Roger W. Kaufman  
Paul G. Ulrich  
Susan M. Freeman  
Attorneys for Respondents

December, 1978.

APPENDIX A  
THE SUPERIOR COURT OF ARIZONA  
YAVAPAI COUNTY

F.C.Y. CONSTRUCTION	)	No. 29494
AND EQUIPMENT CO.,	)	FINAL JUDGMENT ON
et al.,	)	COMPLAINT WITH RE-
	)	SPECT TO DEFEN-
Plaintiffs,	)	DANTS HARRISON,
	)	INC., HUGH H. HARRI-
vs.	)	SON AND DOUGLAS A.
TRANSAMERICA TITLE	)	RUSSELL AND FINAL
INSURANCE COMPANY,	)	JUDGMENT QUASHING
et al.,	)	LIS PENDENS WITH RE-
	)	SPECT TO THE ELEVEN
Defendants.	)	LAKES RANCH

(Assigned to the Honorable James Hancock Division 2)

(FILED: July 15, 1975)

The Court having considered the pleadings, depositions, and affidavits filed in this action as they relate to the plaintiffs' complaint against defendant Harrison, Inc., Hugh H. Harrison and Douglas A. Russell and as they relate to the property known as the Eleven Lakes Ranch, and the Court having heard arguments of counsel with respect to those defendants' Motion for Summary Judgment in connection with plaintiffs' complaint, and the Court having previously entered a minute entry order granting Summary Judgment to the above-named defendants, the Court now finds that those defendants are entitled to Judgment against the plaintiffs on plaintiffs' complaint, that there is no material question of fact with respect to the plaintiffs' complaint and with respect to the specific findings requested by the moving defendants; and, pursuant to Rule 54(b) Arizona Rules of Civil Procedure, the Court further finds that there is no just reason for delay in entering judgment in favor of those defendants,

quashing lis pendens on the Eleven Lakes Ranch, and adjudicating all issues among those parties and the plaintiffs presented by the complaint and the moving defendants in Motions for Summary Judgment. This Court hereby directs that judgment be entered forthwith and;

IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants Harrison, Inc., and Hugh H. Harrison and Douglas A. Russell have judgment against the plaintiffs in this action that plaintiffs take nothing by reason of their complaint, and, with respect to remaining issues in this law suit, as follows:

1. The plaintiffs have no interest affecting title to the real property known as the Eleven Lakes Ranch;
2. The plaintiffs have no real property interest in the conveyance of the Eleven Lakes Ranch property to Harrison, Inc.;
3. The plaintiffs' lis pendens filed in this action does not constitute record notice of any legal claim to a lien or other interest in the title to the real property known as the Eleven Lakes Ranch;
4. Such lis pendens neither constitutes nor gives notice of any cloud upon the title to the property;
5. The lis pendens is quashed; and
6. Costs are awarded to defendants in the amount stated in the statements of costs filed by these defendants in this action.

DONE IN OPEN COURT this 15 day of July, 1975.

/s/ James Hancock  
Judge James Hancock

Copy of the foregoing  
mailed this 14th day  
of July, 1975, to:

[Entered Civil Docket 49  
Page 635]

[Entered Judgment Docket  
16 Page 413]

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/s/ Gayle Gibson

The foregoing instrument is a full, true and correct copy of the original on file in this office.

ATTEST March 25, 1976

CLASSIE GANTT, Clerk of  
Division One Court of Appeals,  
State of Arizona

By /s/ Muriel S. Hume

[Seal]

[Book 1014, pages 235-237]

**APPENDIX B**  
**THE SUPERIOR COURT OF ARIZONA**  
**YAVAPAI COUNTY**

F.C.Y. CONSTRUCTION  
AND EQUIPMENT CO.,  
et al.,  
  
Plaintiffs,  
  
vs.  
  
SELWYN ARIZONA  
ASSOCIATES, et  
al.,  
  
Defendants.

---

(FILED: July 15, 1975)

The Court having considered the pleadings, depositions, and affidavits filed in this action as they relate to the plaintiffs' complaint against defendant Harrison, Inc., Hugh H. Harrison and Douglas A. Russell and as they relate to the property known as the Eleven Lakes Ranch, and the Court having heard arguments of counsel with respect to those defendants' Motion for Summary Judgment in connection with plaintiffs' complaint, and the Court having previously entered a minute entry order granting Summary Judgment to the above-named defendants, the Court now finds that those defendants are entitled to Judgment against the plaintiffs on plaintiffs' complaint, that there is no material question of fact with respect to the plaintiffs' complaint and with respect to the specific findings requested by the moving defendants; and, pursuant to Rule 54(b) Arizona Rules of Civil Procedure, the Court further finds that there is no just reason for delay in entering judgment in favor of those defendants,

quashing lis pendens on the Eleven Lakes Ranch, and adjudicating all issues among those parties and the plaintiffs presented by the complaint and the moving defendants in Motions for Summary Judgment. This Court hereby directs that judgment be entered forthwith and;

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2. The plaintiffs have no real property interest in the conveyance of the Eleven Lakes Ranch property to Harrison, Inc.;
3. The plaintiffs' lis pendens filed in this action does not constitute record notice of any legal claim to a lien or other interest in the title to the real property known as the Eleven Lakes Ranch;
4. Such lis pendens neither constitutes nor gives notice of any cloud upon the title to the property;
5. The lis pendens is quashed; and
6. Costs are awarded to defendants in the amount stated in the statements of costs filed by these defendants in this action.

DONE IN OPEN COURT this 15 day of July, 1975.

/s/ James Hancock

Judge James Hancock

Copy of the foregoing  
mailed this 14th day  
of July, 1975, to:

[Entered Civil Docket 51  
Page 326]

[Entered Judgment Docket  
16 Page 414]

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Renaud, Cook, Miller & Cordova  
45 West Jefferson, Suite 31  
Phoenix, Arizona 85003

/s/ Gayle Gibson

The foregoing instrument is a full, true and correct copy of the original on file in this office.

ATTEST March 25, 1976

CLASSIE GANTT, Clerk of  
Division One Court of Appeals,  
State of Arizona

By /s/ Muriel S. Hume

[Seal]

[Book 1014, pages 238-240]

# ELEVEN LAKES RANCH CHAIN OF TITLE AND SUMMARY OF YARBRO TRANSACTIONS

## Yarbro Transactions

1962-64

B.A. Yarbro owned Eleven Lakes Ranch; James A. Wooten also had partial interest.

Deeds  
1962, 1963, 1964

## Eleven Lakes Ranch Chain of Title

All interest in Eleven Lakes property acquired through 3 sheriff's deeds and Yarbro quitclaim deed by Arizona Savings; all others divested of any interest,

1968

7/26/68 Letter management agreement—B.A. Yarbro and S.A.A.

8/17/68 Yarbro assigns 20% bonus rights under letter agreement to plaintiffs,

8/30/68 and 9/3/68 Maricopa County Superior Court approves sale by Arizona Savings to Transamerica Title Ins. Co.

9/5/68 Eleven Lakes title conveyed to Transamerica as trustee.

9/10/68 Eleven Lakes property placed in Trust No. RH-20,918.

Transamerica Title legal interest as trustee

Henry C. Soto beneficial interest.

9/27/68 Beneficial interest assigned Henry C. Soto Corporation.

9/28/68 Beneficial interest assigned F.O.M. Investment Corporation.

1969

7/22/69 Second letter management agreement—B.A. Yarbro and S.A.A.

8/1/69 Yarbro assigns 20% bonus rights under second agreement to plaintiffs.

1972

4/1/72 Harrison, Inc. loans Selwyn-Edwards & Assoc. \$225,000—loan provision allows Harrison to pursue all default remedies against its collateral. Yarbro approves loan agreement.

4/5/72 F.O.M. Investment Corp. and Selwyn-Edwards & Assoc. make collateral assignment of beneficial interest to Harrison, Inc. as security for loan to Selwyn-Edwards & Assoc.

1973

9/7/73 Yarbro records his two management agreements and assignments of bonus rights, certifying that the second agreement and assignment superseded the first. He did not record his superseded assignment of 9/20/68.

10/19/73 Lis pendens recorded in Yavapai Cause No. 29494.

10/19/73 F.O.M. Investment Corp. directs Transamerica Title to terminate Trust No. RH-20,918 and deed Eleven Lakes to Harrison, Inc. in satisfaction of delinquent loan payments.

10/22/73 Transamerica Title terminates trust and issues warranty deed to Harrison, Inc.